

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

October 15, 2008

In the Matter of
Beechwood Knoll School

OADR Docket No. WET-2008-050
DEP File No. 59-1163
Quincy

RECOMMENDED FINAL DECISION
ON RECONSIDERATION

This matter is an appeal of a Superseding Order of Conditions (“SOC”) issued under the Wetlands Protection Act, M.G.L. c. 131, §40 (the “Act”) and 310 CMR 10.00 *et seq.* (the “Wetlands Regulations”) by the Northeast Regional Office of the Department of Environmental Protection (“the Department”). The Department issued the SOC on June 12, 2008 to the Applicant Beechwood Knoll School regarding proposed construction at the Beechwood Knoll School at 225 Fenno Street in Quincy (the “Property”). On June 26, 2008, the Office of Appeals and Dispute Resolution (“OADR”) received this appeal by William G. Aylward purportedly on behalf of ten named Quincy residents (the “Petitioner”). The appeal was a Notice of Claim that claimed only that the Department had erred in its delineation of salt marsh on the Property, in particular because it did not use the FEMA base flood elevation line as the boundary.

After review of the Notice of Claim, it was clear that there were a number of serious deficiencies in the document, more specifically: (1) the Petitioner failed to produce sufficient

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evidence that it had standing to request an adjudicatory hearing; (2) the Petitioner failed to file required and important documentation to validate the members of the resident group and the legitimacy of Mr. Aylward as the authorized representative; and (3) the Petitioner failed to allege any clear error on the part of the Department in delineation of salt marsh under the requirements of the Wetlands Protection Act, M.G.L. c. 131, § 40 or the Wetlands Regulations at 310 CMR 10.00 et seq., since the Wetlands Regulations require use of the spring tide line, not the FEMA base flood elevation line, to delineate salt marsh resource areas and no other specific basis for error was alleged. See, 310 CMR 10.32.

After multiple opportunities were given to the Petitioner to correct these deficiencies, a Recommended Final Decision was issued on September 17, 2008, affirmed by Final Decision on September 19, 2008, dismissing Petitioner's Notice of Claim. On September 30, 2008, one of Petitioner's members, William Aylward, filed a Motion to Reconsider the Final Decision. Mr. Aylward has still not obtained and filed authorization from the Petitioner's group to represent the group in filings with OADR. Therefore, it appears that he has no authority to file motions for the Petitioner. However, to provide some guidance to Mr. Aylward for any future appeals, I have prepared this Recommended Final Decision on Reconsideration to address his motion.

Under 310 CMR 1.01(14)(e), Petitioner has a heavy burden regarding its motion for reconsideration; it must demonstrate that a finding of fact or conclusion of law on which the final decision was based is "clearly erroneous." Petitioner has failed to identify any erroneous finding of fact or conclusion of law in either the Commissioner's Final Decision or the Recommended Final Decision on which she relied. Petitioner simply renews its arguments that were already considered and rejected in the Commissioner's Final Decision. "Where a motion [for reconsideration] repeats matters adequately considered in the final decision, renews claims

or arguments that were previously raised, considered and denied,...it may be summarily denied.”

See, 310 CMR 1.01(14)(e).¹

Mr. Aylward has repeated arguments that were already made by him in earlier filings. Therefore, his motion for reconsideration should be summarily denied. However, I will address one point to clarify the rules for adjudicatory proceedings for Mr. Aylward for future reference. Mr. Aylward continues to object to the requirement for the filing of affidavits by members of the Petitioner’s ten residents group that state that Mr. Aylward is an authorized representative. He claims that the Department is erroneously applying the language of 310 CMR 1.01(2)(b), by requiring affidavits from Petitioner’s members. That regulation states that a party who is not an attorney must provide a “signed affirmation by the party, or by each member of a ten person or residents group, that the representative is duly authorized to represent the party in an adjudicatory appeal.” Mr. Aylward states that an “affirmation” is not the same as an “affidavit.” Therefore, he claims that the Department erred.

In fact, the two words are very close in meaning. Both an “affirmation” and an “affidavit” are statements made under the penalties of perjury. An “affirmation” is defined in standard dictionaries as “a solemn declaration made under the penalties of perjury by a person who conscientiously declines taking an oath.” *See*, Merriam-Webster On-line Dictionary, <http://www.merriam-webster.com>. The Department used this term in the Adjudicatory Procedure regulations so that parties who conscientiously objected to giving an oath to God could still comply with this regulation by making a statement subject to the penalties of perjury. An “affidavit” is also a statement made under penalties of perjury either by oath or affirmation, but is also expected to include a notarization. *See*, Merriam-Webster On-line Dictionary,

¹ Mr. Aylward received multiple notices of the legal bases for dismissal of this appeal. Three Orders were issued with detailed instructions on how to remedy the deficiencies in the notice of claim.

<http://www.merriam-webster.com> (“Affidavit” defined as “a sworn statement in writing made especially under oath or on affirmation before an authorized magistrate or officer.”)

By using the requirement for an “affidavit,” I did not intend to force any of the resident members to make a statement under oath. Affidavits may also be provided in this Commonwealth either under oath or by affirmation under penalties of perjury. Typically, an affidavit must also be notarized. While providing a notarized affirmation is not required by 310 CMR 1.01(2)(b), presiding officers in adjudicatory proceedings have the authority to require parties to conduct actions to defend and explain their positions when challenged. Presiding Officers are granted the “power to take any action authorized by M.G.L. c. 30A to conduct a just, efficient and speedy adjudicatory appeal” as well as the power to “issue orders to show cause,” “impose sanctions,” “administer an oath or affirmation,” and “manage the presentation of evidence and participation of the parties so as to develop an adequate and comprehensible record of the adjudicatory appeal.” See, 310 CMR 1.01(5)(a).

In this case, the legitimacy of the petitioner’s members and the status of Mr. Aylward as a representative were challenged. Mr. Aylward responded to an initial Order for a More Definite Statement by providing a list of residents which had no members in common with the residents listed in the original notice of claim, other than Mr. Aylward. This discrepancy cast serious doubt upon the legitimacy of the standing of Petitioner’s group, and the Department moved to request the Presiding Officer to issue another order to show cause. I issued an Order to Show Cause directing all of the residents to file affidavits affirming their intent to file the notice of claim and clarifying whether or not they intended to have Mr. Aylward act as their authorized representative. The Petitioners did not comply with these orders. Therefore, there was no information at all, either in the form of an affirmation or affidavit, to support the legitimacy of

the appeal or of Mr. Aylward's authority to have filed the appeal papers in the first place. This provided more than adequate grounds for the conclusion that the appeal must be dismissed. In addition, the Petitioner also failed to provide even an offer of proof as to how the Petitioner intended to demonstrate that the delineation of resource areas at the Property was in error,

It was a legitimate use of the powers of a Presiding Office for me to require affidavits from the residents. Presiding Officers at OADR have required such affidavits in other matters where the legitimacy of a resident group or their authorized representative has been called into question, and these affidavits have been provided to substantiate the members and representatives of the group. *See, e.g.*, record of proceedings in Matter of Campbell, Docket No. 2007-090, Recommended Final Decision (May 28, 2008), adopted by Final Decision (June 27, 2008) (SOC was vacated when ten resident group established clear error in motion for summary decision. Resident group had received an earlier favorable Ruling on Applicant's Motion to Dismiss validating the group's membership and representative on the basis of affidavits filed by its members).

If ten or more members of Petitioner's group, individually or through a clearly authorized representative, had made a good faith effort to respond to the three orders to show cause and for a more definite statement, it would have justified continuing the proceeding. However, without receiving any substantive evidence to support the legitimacy of the Petitioner's group, its representative or its claims, it would do injustice to the other parties to force them to incur the costs to prepare for and appear at a pre-screening conference.

For all these reasons, and the reasons articulated in the September 17, 2008 Recommended Final Decision, I recommend that Mr. Aylward's Motion to Reconsider be denied.

**NOTICE- RECOMMENDED FINAL DECISION
ON RECONSIDERATION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Laurel A. Mackay
Presiding Officer

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